

DOES THE SMITH ACT THREATEN OUR LIBERTIES?

American Law and the Communist Conspiracy

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THE Smith Act, and the judicial decisions on its constitutionality, are among the most discussed, and unread, of modern official documents.

In brief, the Smith Act makes it unlawful for any person to advocate the overthrow of the government by force and violence (Sec. 2), or for any person to attempt to commit or to conspire to commit such advocacy (Sec. 3). In any discussion of the Act, several sorts of issues must be distinguished. One is its constitutionality. A second is its wisdom. A third is the justice of its application to the Communist party. Or to pose the questions directly:

1. Is the law behind the indictment of the leaders of the Communist party constitutional?
2. Constitutional or not, is it wise to have brought the charge?
3. Were the defendants, i.e., the leaders of the Communist party, guilty of the charge—

EVERY attempt to use legal sanctions against the American Communist party has met with a storm of protest against the outlawing of "dissent." But where does dissent end and conspiracy begin? And what actions may a democracy take against conspiracy, and still remain a democracy? SIDNEY HOOK has in many writings argued that Stalin's Communism is in no legitimate sense "dissent" but in reality conspiracy. In this discussion of the Smith Act, he addresses himself primarily to the second question: How may a democracy defend itself against a conspiracy one of whose aims is to destroy the right of dissent? Dr. Hook was born in New York City in 1902, took his B.S. at CCNY, and M.A. and Ph.D. at Columbia, and immediately embarked on a teaching career that brought him in a relatively short time the chairmanship of the department of philosophy at NYU (Washington Square). At the same time Professor Hook has been active in anti-totalitarian organizations like the international Committee for Cultural Freedom, which he organized, and the International Committee for Academic Freedom, has contributed to numerous magazines all over the world, and written a number of books.

did they actually advocate the use of "force and violence"?

I

THE constitutionality of the Smith Act, it may be argued, is now a matter of history, since the Supreme Court has decided the question. However, no adjudication of any Congressional legislation as constitutional can be regarded as final; the Supreme Court can always reverse itself by adopting the fiction that a new case before it, apparently involving the very same issues on which it has already taken a stand, is in some respects relevantly different, and therefore ground for a new decision. Both cases then become precedents to be cited subsequently.

But most discussion about whether a piece of legislation is constitutional or not is actually a discussion about whether it is wise or not, "democratic" or not, enlightened or not. Anyone who reflects on the number and variety of laws declared constitutional in the past, some of which supported slavery, will admit at once that legislative acts may be constitutional and unwise, or, like the federal income tax when first adopted, wise and unconstitutional. Thus one is concerned with the wisdom of the Smith Act rather than its constitutionality, and it is to its wisdom that we address ourselves here. One preliminary question should be cleared up. It is asserted that the "right to revolution" is abrogated by the Smith Act. This right is mentioned, not in the Constitution, but in the Declaration of Independence, and there, not as an absolute right,* but as one justified under certain conditions. Only, it will be noted, under

*It may not be supererogatory to remind the reader of the exact words: "... Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes. . . . But, when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce [mankind] under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security."

despotism do "the people" have a right to overthrow their rulers. The Declaration distinguishes between revolutions of this character and the "insurrections" of minorities that the English king is accused of fomenting among the American colonists.

Some writers have inferred that, because revolution is justified in situations where democratic processes are absent, a similar justification exists in situations where democratic processes obtain. This overlooks the various connotations of the term "right," which may be used in a legal sense or in a moral sense. A legal right is any claim to goods or services or privileges made by one or more individuals that *society stands ready to enforce*. Legally, therefore, it is utter nonsense to speak of the "natural" or "absolute" right to revolution. Justice Hand disposed effectively of this claim when he said, in his opinion for the Court of Appeals which found the Smith Act constitutional:

The advocacy of violence may, or may not, fail: but in neither case can there be any "right" to use it. Revolutions are often "right"; but a "right of revolution" is a contradiction in terms, for a society which acknowledged it, could not stop at tolerating conspiracies to overthrow it, but must include their execution.

However, in all historical situations, democratic or not, persons have a *moral* right to revolution if they are rationally convinced that their fundamental values can be preserved *only* by the overthrow of the existing regime. But by the same token, people rationally convinced that any attempt to overthrow the existing regime by force and violence will destroy their own fundamental values have a *moral right to suppress* the revolutionists.*

*This does not mean that in any particular historical situation both sides are equally justified in their analysis of the values involved and of the needs and interests in which values are rooted. One or another side may be hasty, partial, or mistaken. So long as the processes of reflective inquiry are kept open, what appear to be ultimate and inarbitrable conflicts of interest may prove to be negotiable. When such conflicts are not negotiable, what is shown is not that moral values have no objective reality but that they are not universal. For further elaboration of this point see my article in COMMENTARY, March 1948, "Why Democracy Is Better," and my "The Desirable and Emotive in Dewey's Ethics" in *John Dewey: Philosopher of Science and Freedom*.

THERE is nothing self-contradictory in asserting that, in *any* society, human beings may have a moral right or rational claim to revolution. What is self-contradictory is for someone who regards himself as a principled democrat—that is, a person committed to a society where change is supposed to be effected by non-violent means, and in fact is—to believe in the right to violent revolution in such a democratic society. Societies, even where democratic processes operate unabridged and decisions truly rest upon the freely given consent of a majority, may cause men sincerely to feel that they must attempt to overthrow them. But when men act in this manner they cannot sincerely or consistently call themselves *democrats*, even if they consider themselves God's angry men. (We must, of course, grant that democratic government and good government are not necessarily always identical in meaning. That democratic government produces good government, or is more likely to produce good government, than non-democratic government—these are *empirical* hypotheses, warranted by most of the evidence, but not by all.)

These considerations may appear to be abstract, but failure to think them through usually leads to confusion. One who accepts the principles and institutional practices that define a democracy has neither a moral nor a legal right to use force and violence to overthrow a democracy that satisfies the definition, merely because its fruits may be unsatisfactory to him personally. On the other hand, while he may not have a *legal* right to attempt the overthrow of a dictatorship, because it writes the rules of law, he certainly has a *moral* right to, because he thus passes judgment on that written law; that is, he has not accepted it in the first place, is not himself a believer in dictatorship.

On the assumption that they are sincerely convinced of the badness of democracy, we may grant totalitarians the "moral" right to revolt against a democracy, provided it is understood that we democrats have the "moral" right—nay, duty—to crush that revolt, and penalize them for making it, when and if they make the attempt or prepare for it. And surely, criticism of the Smith Act as undemocratic, when it comes from totalitarians, especially of the Communist and fascist stripe, should be dismissed as indecent hypocrisy.

It is from the point of view of one who accepts democracy that I am concerned with the Smith Act here. All who believe with me would admit, of course, that we are justified in enacting and enforcing legislation punishing the overt act of revolt or insurrection. But the Smith Act makes punishable, not the overt actions—which are covered by other legislation—but the *advocacy* of, or *incitement* to, the use of force or violence. Further, it makes punishable a conspiracy *to teach* any doctrine containing such advocacy or incitement.

WHAT is a "conspiracy"? Some clarification is necessary at this point. In many contexts, the word "conspiracy" refers to non-verbal overt behavior. As usually employed outside legal contexts, it means active planning with others and involves something more than the use of words. The verb "to conspire," however, is much more comprehensive. It denotes, not merely the overt act of conspiracy, but the process of conspiring. On occasions, mere communication, oral or written, between two or more persons may be considered as part of the process of conspiring—depending on the place, the circumstances, and the nature of the words used.

Many people who are critical of the Smith Act concentrate their fire on Section 3, which makes it illegal "to conspire" to advocate the use of force and violence. Since there was no evidence indicated of "conspiracy" in the usual sense of overt non-verbal behavior—say, the gathering of arms—they conclude that it is absurd to charge the Communist defendants with having attempted "to conspire." This criticism assumes that the use of words by themselves can never be offered as evidence of an attempt "to conspire."

It is the great merit of Justice Jackson's decision to call attention to the legal fact that, in our system of law, conspiracies in other situations are adjudged to exist on the basis of the *same kind* of evidence that was introduced in the case of the Communist party leaders. The legal rule defining conspiracy in interstate commerce, for example, and permitting evidence chiefly of a verbal kind to be used to establish the existence of such conspiracy, has never been challenged by the opponents of the Smith Act.

"Conspiracies of labor-unions, trade asso-

ciations, and news agencies," writes Justice Jackson in his concurring opinion on the Smith Act, "have been condemned although accomplished, evidenced, and carried out, like the conspiracy here, chiefly by letter-writing, meetings, speeches, and organizations." He goes on to cite an opinion of Justice Holmes covering the Sherman Anti-Trust Act: "Coming next to the objection that no overt act is laid, the answer is that the Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring, a condition of liability." To which Justice Jackson adds the dry observation: "It is not to be supposed that the power of Congress to protect the nation's existence is more limited than its power to protect interstate commerce."

Consequently, there is a legal warrant for accepting speech, writing, and organizational activity as evidence of conspiracy to do something unlawful. The main question, then, is not Section 3 of the Smith Act, which forbids conspiracy to do what is proscribed in Section 2, but Section 2 itself, which forbids the advocacy of the overthrow of government by force or violence. For if it is wrong to advocate the use of force and violence, it is wrong to conspire to do so. But is the advocacy itself wrong?

SINCE the First Amendment enjoins Congress from passing any laws abridging freedom of speech, some opponents of the Smith Act regard it as unconstitutional on this ground. But, construed literally, the First Amendment would make even laws against criminal libel unconstitutional. To read the First Amendment as if it made the right to speech absolute and unconditioned would commit one to the same kind of absurdities as those resulting from acceptance of the statement in the Declaration of Independence that all men are created free and equal as a proposition in theology or biology instead of political ethics.

Outside legal circles, this appeal to the right of free speech as an absolute one is so common, and buttressed so often by invoking mistakenly the position of Justices Holmes and Brandeis, that it is pertinent here to quote from an opinion of Justice Holmes speaking for a unanimous court:

The First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not intended to give immunity for every possible use of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.*

If a democracy does not accept the belief in absolute rights, how then does it distinguish itself morally from a dictatorship? I shall consider this question later; but for the moment I wish to point out that the defendants tried under the Smith Act did not claim in any way the absolute right of freedom of advocacy. Their main contention was that, even if the charge were true, such advocacy did not constitute a "clear and present" danger to the government.

Thus even these defendants recognize in principle what common sense always has, viz., that, if an act is criminal or immoral, it is wrong to advocate or counsel its performance even if the liability for such advocacy is not enforced. I cannot resist quoting from an earlier opinion of Justice Hand a generation ago which expresses with felicity the logic, the law, and the psychology of the matter:

One may not counsel or advise others to violate the law as it stands. Words are not only the keys to persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.

II

THE general principle that limits the right to free speech is not expressed in the Constitution, but in a famous decision by Justice Holmes stating that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Like the phrase "due process of law," the phrase "clear and present danger" seems to

**Frohwerk v. United States*, cited in Justice Jackson's concurring opinion.

have a fluid meaning. How clear must the danger be? To whom must the danger be clear? How present—today, this year, or this century? And how great the danger? The Justices of the present Supreme Court are at loggerheads with each other as to the exact meaning to give Holmes's phrase. Most discussion is frankly concerned with what the words *should* mean—how they should be interpreted in specific cases—rather than with what they *did* mean to Holmes and Brandeis. What is true of constitutional interpretation generally is true of interpretations of dicta like "clear and present danger"—what seems reasonable to the Court at any given time is read back into the original intent of Holmes's words.

If we examine the context in which Holmes first used the phrase, we may be able to get a better notion of what he had in mind, independently of whether we desire to accept or reject his proposed criterion. In the *Schenck* case the defendant was charged with obstructing recruiting and causing military insubordination by denouncing conscription in a handbill. The most inciting sentence of the handbill, only a few of which were circulated, was, according to Justice Vincent, the following: "You must do your share to maintain, support, and uphold the rights of the people of this country."

It was, thus, the mere distribution of a handbill containing this sentence that Holmes, speaking for a unanimous court, held to create a "clear and present danger" which imperiled the conscription program and military discipline. It is obvious that Holmes could not have meant by "clear and present danger" only an act that actually threatened to be successful. No one, by any stretch of fancy, could have imagined that the handing out of a few leaflets by a lone individual would effectively undermine the conscription program. Nonetheless, Justice Douglas, in his minority opinion on the Smith Act, in parting company with Holmes and Brandeis, denies that there is now a "clear and present danger" of violent revolution, and gives as his reason the further opinion that the Communist petitioners have not the "slightest chance of achieving their aims."

Now it so happens, although Justice Douglas seems unaware of it, that the Kremlin often orders its fifth columns to use

force and violence in a bid for political power notwithstanding that the chances of success are very remote, and that predictions of failure have been made by those who receive the order. The reasons need not concern us here. In the 1920's futile Communist insurrections were mounted in Thuringia, Hamburg, and Canton. But even a putsch that is quickly defeated can have grave consequences for the community in disorder and confusion, in the undermining of public faith in government, or in lives. Whatever the "clear and present danger" formula may mean, it cannot imply to any reasonable person that speech advocating a crime should be curbed only when it is extremely probable that the crime will be successful.

WHAT is relevant in determining whether or not to invoke the "clear and present danger" formula, is the probability of an attempt itself, not the probability of its success. Whether an attempt is actually made to carry out what is advocated depends on two things: the *readiness* of those advocating revolutionary overthrow to act when they believe the situation to be ripe—something the jury is called on to decide; and, second, the state of the world, the temper of the times, the objective threats to the existence of democratic institutions—which the court pronounces on (for no good reason, incidentally, that I can see, since these are not matters of law but of fact).

The majority opinion interprets "a clear and present danger" in the same way as Judge Learned Hand does: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Here "evil" means the substantive evils Congress has a right to act against, and "improbability" is synonymous with "remoteness." How remote is the possibility, or danger, of the Communist conspiracy making attempt to carry out what it advocates?

All the opinions on the Smith Act, except for the dissents of Justices Black and Douglas, recognize that the phrase "clear and present danger" is no mere shibboleth, and that its intelligent application requires an analysis of the particular situation involved. Some general consistency between earlier and later cases there must be, however, if

the phrase is not to become arbitrary. What seems extremely puzzling to me is how anyone can approve of the determination that a clear and present danger existed in the Schenck case—when Justice Holmes first formulated his principle—and contest the finding that a clear and present danger exists in the case of *Dennis et al.*, who are an integral part of a highly organized international conspiracy. To me it seems that the Supreme Court was unjustified in its decision in the Schenck case; Schenck had not the remotest chance of really affecting the conscription program; and so to approve of the decision in his case and disapprove of it in the *Dennis* case, as so many liberals have done, makes no sense at all.

AS THE Smith Act has now been interpreted by the courts, it applies only to cases in which a "clear and present" danger exists that an attempt at revolutionary overthrow will be made. Now the question arises: *who* is to judge whether or not a clear and present danger exists? Two different things have been confused in the court opinions on this point. The first question is whether or not the state of the times justifies restrictions in the interest of national security on the freedom of speech to advocate revolutionary overthrow. The second question is whether or not the specific case at bar, in which the defendants have been charged with conspiracy to advocate such overthrow, is one in which a clear and present danger flows from *this particular advocacy*. The opinion of the majority of the judges is that both questions are for the Court to decide. My own view is that the first question is one for Congress to decide since it involves a conflict of social interests—the interest in national security and the interest in free speech. The second question is for the jury to decide.

The first question, as Justice Frankfurter points out in his remarkable concurring opinion, obviously falls within the *legislative* power because it is a matter of policy. And responsibility for policy rests with elected representatives who may be refused our confidence at election time, and not with judges who are beyond reach. As far as the making of policy goes, a judge's vote counts no more than any other citizen's. Justice Frankfurter's words in this connection ought to be inscribed in letters of gold on the portals of

the Supreme Court: "Our duty to abstain from confounding policy with constitutionality demands perceptive humility as well as self-restraint in not declaring unconstitutional what in a judge's private judgment is unwise and even dangerous."

Leaving aside the question of constitutionality—was Congress justified in assuming the existence of a clear and present danger of such gravity as to warrant placing restrictions on the advocacy of revolutionary overthrow? That a danger to our national survival exists which is clear, present, flourishing, and extremely powerful seems to me to be undeniable. This danger flows from the unremitting campaign of the Kremlin, now using open violence, now subversion and espionage, against the United States. These dangers may be distinguished in their internal and external aspects, but they cannot be separated; the cant opinion so popular in certain circles that "domestic Communism is no longer any danger" is misleading, and dangerous to boot. There is no such thing as merely domestic Communism. Communism is an international movement whose capital is Moscow; it is this movement that is the enemy of American democracy; and the American Communist party, no matter what its size or influence (which is not inconsiderable), forms an integral part of that movement. Without its organic tie to the Soviet state apparatus with all its machinery for war, espionage, and terror, the American Communist party would have only nuisance value, its members would be ineffectual, candidates for the political mental ward now inhabited by Communist splinter groups like the Trotskyists. It is not the words uttered by members of the Communist party that make them dangerous, but their organizational ties; these make them the paramilitary fifth column of a powerful state, obligated to strike whenever their foreign masters give the word. Even aside from its potential for spying and sabotage in important areas of security and defense, the Communist party has been able, by virtue of its substantial fellow-traveler periphery, to exercise considerable pressure on foreign policy and on public opinion. During the heyday of the anti-fascist Popular Front, the ties of American fascists to movements abroad were immeasurably less organic than the ties of the Communist party to the Soviet Union. But had any-

one said that, after all, since there was so little danger from domestic fascism we need have no fear of the organized expansion of the fascist movement, he would have been deemed an apologist for fascism by the Popular Front liberals.

THE aim of the Smith Act—to paralyze this fifth column—is certainly justified in the light of the available facts. But the method chosen to achieve it is inept. What should have been proscribed was not *speech* to achieve revolutionary overthrow, but *organization* to achieve it, and not merely any revolutionary organization but only one created and controlled by a *foreign power*.

I know a gentle, rather muddle-headed man, formerly a member of the IWW, who makes vehement speeches urging the working classes to revolt without resort to the parliamentary process, and to destroy not only the state, in which he professes not to believe, but the capitalists as a class. He sounds bloodthirsty, but anyone who hears him knows that it is all rheum and wind. Technically, however, according to the Smith Act, Section 2, Paragraph (A), Subhead (1), this feeble, harmless old man would be liable to prosecution and punishment. Now, surely Congress did not intend this.

In 1940 the leaders of the Trotskyist Socialist Workers party were found guilty of violating the Smith Act. I have always wondered why the Supreme Court refused to pass on the constitutionality of the Smith Act in this case. Although, like other ideological Communists, they denied it, this Trotskyist faction does believe in, and firmly advocates, the revolutionary overthrow of the American government by force and violence. It accepts the theses and resolutions of the first four congresses of the Communist International, and, if anything, is more intransigent in theory than the official, Stalinist Communists, whom it has regarded, first as "centrists," and then as "Thermidorians." It has all the venom of the Stalinists, without the fangs. Although professing loyalty to the Soviet Union as a "workers' state"—one which would shoot them out of hand if it could reach them!—this group's advocacies and activities have never offered the slightest threat to the security of the United States. The reason is that, although tightly organ-

ized, the Socialist Workers party is completely independent of any foreign power, does not take orders from the Kremlin, does not utilize the manpower and technical resources of the Kremlin's international apparatus, and does not collaborate in the espionage of the Communist party. The prosecution of these Trotskyists was not merely foolish, but scandalous.* Certainly, Congress did not have such groups in mind when it passed the Smith Act. Yet they were liable under Section 2, Paragraph (A), Subhead (3), which outlaws any organization that advocates revolutionary overthrow.

Judge Hand admits that the wording of the Act, literally construed, would "make criminal the fulminations of a half-crazy zealot on a soapbox, calling for an immediate march on Washington." As the Supreme Court has interpreted the Act, however, it has remedied this by introducing in effect the "clear and present danger" clause. Judge Hand is apparently dubious about the wisdom of revising the language of the Smith Act, but it seems to me that it would be a marked step in clarification, as well as providing a further safeguard against arbitrary misinterpretation by a future court, were Congress to amend the Smith Act by inserting in the relevant section the italicized words that follow:

(A) It shall be unlawful for any person—

(1) To knowingly or willfully advocate, abet, advise, or teach, *in the case that it constitutes a clear and present danger*, the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence. . . .

(3) To organize or help to organize, *in the case that it constitutes a clear and present danger*, any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force and violence. . . .

A certain area of ambiguity will always

*It has always been unclear as to why this action was taken against the Trotskyists and not against the Stalinists until many years later. At the time it was widely alleged, without contradiction from any official source, that the prosecution was ordered by President Roosevelt in payment of a political debt to Daniel Tobin, whose control of the Teamsters' Union was being threatened by the Trotskyist-controlled Minneapolis local.

remain since what constitutes "a clear and present danger" will have to be determined in each case. But the explicit presence of such a phrase in the law itself would go a long way towards discouraging indiscriminate use of the Smith Act against harmless private individuals, including societies of crackpots and amateur conspirators who are greater threats to the peace of mind of their parents and wives than to the security of the nation. I believe this amendment desirable despite the fact that the widely heralded predictions, made with such hysterical fervor, that the Smith Act would be used against liberals, democrats, and socialists in an attempt to suppress thought have not materialized.

THIS brings me to the second question referred to above, namely, whether any particular advocacy of the use of revolutionary violence constitutes a clear and present danger. In the case of the Communist party defendants, the jury was called upon to determine only whether they had violated the statute, but not whether such violation constituted a clear and present danger. That determination was made by Judge Medina as a matter of law, affirmed by Judge Hand, and upheld by Justice Vinson, who wrote the majority opinion of the Supreme Court. Judge Medina instructed the jury as follows:

If you are satisfied that the evidence establishes beyond a reasonable doubt that the defendants, or any of them, are guilty of a violation of the statute, as I have interpreted it to you, I find it as a matter of law that there is a sufficient danger of a substantive evil that the Congress has a right to prevent, to justify the application of the statute under the First Amendment of the Constitution.

This is a matter of law with which you have no concern. It is a finding on a matter of law which I deem essential to support my ruling that the case should be submitted to you to pass on the guilt or innocence of the defendants.

I agree with the finding, but cannot see in what way the issue was a matter of law. It seems to me that enough evidence was introduced, or could easily have been, to convince any but Communists, their sympathizers, or doctrinaire pacifists who believe that Stalin, like Hitler, has a loving heart, that the international Communist movement, of which these defendants were trusted members, con-

stituted a clear and present threat to free American institutions and our national independence. The only valid point that Justice Douglas's dissent makes is that this question, being one of *fact*, should also have been considered by the jury. But if this is indeed a question of fact, then, whether it falls within the province of court or jury, it will be best answered by the testimony of those who have adequate familiarity with it. At the time he wrote his opinion on the Smith Act, Justice Douglas himself did not give evidence of the possession of such familiarity.

The late Justice Brandeis was supposed to have made a revolution in the approach of the Supreme Court by trying to dig out the empirical data bearing on the effects of social legislation like minimum wage laws, instead of trying to deduce wise policies from ambiguous legal expressions. Although the Justices of the Supreme Court have in some cases shown increasing awareness of certain obvious historical facts about the Communist movement in recent times, on the whole they have been scandalously remiss in acquainting themselves with Communist theory, practice, and organization. The late Justice Frank Murphy's decision in the *Schneiderman* case, finding that the Communist party did not believe in what it said it believed, betrays a sublime indifference to an easily verifiable truth. And in pronouncing on the Smith Act, even Justice Frankfurter, who had read—belatedly, alas—the Canadian Report of the Royal Commission to Investigate Communication of Secret and Confidential Information to Agents of a Foreign Power, added in a footnote to an opinion that otherwise ranks with the best of Holmes and Brandeis: "There appears to be little reliable evidence demonstrating directly that the Communist party in this country has recruited persons willing to engage in espionage or other unlawful activity on behalf of the Soviet Union." Not only have sworn testimony and corroborative evidence been supplied by former secretaries of the Communist party, and by former active underground agents, to the effect that the American Communist party did recruit its members for espionage work and other unlawful activity; the public record names the individuals on the Central Committee of the American Communist party who were liaison officers with the three Soviet espionage organizations in this coun-

try, and were entrusted with the selection of agents. The court records in the *Hiss*, *Remington*, and other cases, as well as the investigations of the Committee on the Judiciary of the United States Senate, and other government agencies, offer much well-documented material on the activities and influence of the international Communist apparatus and the use of affiliated Communists and fellow-travelers in opinion-molding and governmental circles: such material might be read with great profit by our Justices as well as others.

JUSTICE VINSON offered a mild characterization of the nature of the Communist party, and of the historical situation, in justification of the Court's finding of a clear and present danger. He said:

The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries to whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score.

To this Justice Douglas acidly retorted: "That ruling is in my view not responsive to the issue in the case. We might as well say that the speech of petitioners is outlawed because Soviet Russia and her Red Army are a threat to peace." Why not? Under certain circumstances this might very well be the case. The elementary duty of the court, including Justice Douglas, is to study the techniques of infiltration, penetration, and open warfare used by the Soviet Union and its agencies against the United States in Korea, Berlin, Italy, South and Central America, and to assess the cumulative effects of its campaign of subversion and defamation. The members of the Communist party are, literally, the fifth column of the Red Army, and the success and strategic position of that army are certainly relevant in considering the danger, not merely of Communist advocacy, but of Communist organization in this country.

Justice Douglas does admit "that the nature of Communism as a force on the world

scene would, of course, be relevant to the issue of clear and present danger of petitioners' advocacy within the United States." But he makes no attempt to consider that "nature." Instead, he regards the political strength and position of the Communist party in *this* country as the "primary consideration," ignoring its ties with the international Communist movement, and scoffing at the notion that by its own efforts, including its capacities for sabotage and espionage, the American Communist party has even "the slightest chance of succeeding in its aims." Justice Douglas elaborately overlooks the *fact* that the American Communists do *not* work in isolation, but in accordance with a co-ordinated strategy that has behind it the power of a regime which controls the human and natural resources of one-third of the globe.

Nor, as we have already seen, is the likelihood alone of the success of conspiratorial action the decisive matter; one plant needlessly struck, one atomic installation sabotaged, some key state secrets betrayed, in conjunction with the general Soviet strategy, may have effects out of all proportion to their apparent proximate causes.

At the time Justice Douglas wrote his dissent, actual war between one section of the Communist International and the United States as part of the UN was raging in Korea, the Communist war of nerves against the West was being thrown into high gear, neutralism was gaining in Europe, and the shocking record of Communist espionage lay revealed, if only in part, before the world. To deny under these circumstances that an organization of some tens of thousands of disciplined conspirators, absolutely controlled by a declared enemy, with a reliable periphery of some hundreds of thousands, constitutes a clear and present danger to the security of the nation shows a stubborn will to believe that Providence or luck will protect those too blind to protect themselves.

III

THAT the Communist party, despite its disclaimers, does advocate the use of force and violence is revealed in all its basic documents. The contention that the use of force and violence is reserved only to meet insurrectionary threats from non-Communists *after* Communists have peacefully and demo-

cratically come to power is disingenuous. A similar characterization must be made of the dodge adopted by John Strachey, when he was a Communist, in resisting the threat of deportation from this country by a nervous Attorney General. Communists, he said, do not *advocate* the use of violence; they merely *predict* it. But this runs counter to the entire Communist conception of the nature of a belief as a guide to action. Communists feel justified in predicting the use of force and violence because in reality they urge and foment it. Their very theory of knowledge instructs them that in social affairs, at least, all concepts are not merely predictive but directive, and ultimately expressions of class and party values.

The subterfuge that the use of force and violence is only a defensive measure, taken in advance against an anticipated reaction, is a contribution of Stalin to the ideological strategy of Bolshevism. Lenin and Trotsky were much more forthright on this score. In fact, during the struggle for succession to Lenin's place, Trotsky accused Stalin of lack of revolutionary integrity for not advocating insurrection as an offensive tactic in the struggle for state power. To which Stalin replied:

An original peculiarity of the revolutionary tactics of this period must be pointed out. This peculiarity consists therein that the revolution attempted to carry out every, or almost every step of its attack under the appearance of defense. There is no doubt that the refusal to permit the transfer of troops was a serious aggressive act of the revolution; nevertheless this attack was undertaken under the slogan of the defense of Petrograd against a possible attack of the external enemy. There is no doubt that the formation of the revolutionary committee was a still more serious attack against the Provisional Government; *nevertheless it was carried out under the slogan of the defense of the Petrograd Soviets against possible attacks of the counter-revolution.* (In *Errors of Trotskyism*, London, 1925, Eng. trans., pp. 225-226.)

Communist parties throughout the world have well learned this lesson of disingenuous slogans.

IV

SOME words must be said about the implication in Justice Douglas's opinion that the law upheld by the majority decision

is hardly different from the law of the Soviet state as expressed by Vishinsky when he said: "In our state, naturally there can be no place for freedom of speech, press, and so on for the foes of socialism."

It would be difficult to find in the annals of the Supreme Court an observation so unjustifiable and injudicious. Hardly anything could be more explicit in Judge Medina's instructions to the jury, in Judge Hand's opinion, and in Justice Vinson's majority decision, than the continually reiterated assertion: "It is perfectly lawful and proper for the defendants or anyone else to advocate reforms and changes in the laws, which seem to them to be salutary and necessary. No one has suggested that the defendants transgressed any laws by advocating such reforms and changes. No syllable of the indictment refers to any such matters."

The charge was not conspiracy to advocate the abolition of capitalism or the establishment of socialism. The charge bore on the advocacy of, and conspiracy to advocate, the use of force and violence to overthrow the state irrespective of the economic program of the defendants. Surely, Justice Douglas is able to see the difference between denying a man certain freedoms, indeed every freedom, to propose economic change—which marks Soviet law and practice—and denying him the freedom to advocate that these reforms be carried out by force and violence, as does the Smith Act.

To be sure, every state must evaluate the rights of the individual by their consequences upon society or upon the rights of other individuals. That is why, in the interest of social welfare or national security, which involves the rights of all individuals and not merely those of any single person, any particular right might be abridged. No right can be unconditionally affirmed independently of how it affects the community. This is true both in a democracy and in a totalitarian dictatorship.

But, in a democracy, the social welfare or national security in whose name a right may be abridged is determined by the community or its responsible representatives—responsible, in the sense that they can be removed. Freely given consent of the majority enters in a way completely absent in a dictatorship. Second, the processes by which such decisions are made are open, so

that the opposition can be heard. Third, the decision is limited, renewable, and abolishable. The mandate is not made in perpetuity. Fourth, a democracy, as Professor A. E. Ewing has well pointed out, regards the freedoms of the individual as possessing an intrinsic worth, essential to the integrity of his personality, which is itself the object of supreme worth, and therefore a democracy moves slowly and reluctantly towards the abridgment of personal rights. It requires a genuine crisis, a genuine, clear and present danger. Totalitarian regimes like Stalin's or Hitler's deny the intrinsic worth of personality, and the value of the liberty flowing from that worth; thus they can move immediately, brutally, and arbitrarily towards suppression.

We have already pointed out that, *from the point of view of a democrat*, one has a moral right to advocate the use of force and violence against a dictatorial regime that provides no peaceful processes by which to struggle against evils and injustices. Again, *from the point of view of a democrat*, one has no moral right to advocate the use of force and violence against the democratic community if, through open and honest processes of inquiry, discussion, and decision, it is possible to remove evils and injustices.

In short, Justice Douglas's likening of Vishinsky's dictum to the law as expressed by his colleagues on the Supreme Court bench is a piece of demagogic rhetoric no less injudicious and irresponsible because it is made by a member of the highest judiciary body in the land.

V

THE Smith Act is imperfectly phrased. Were it to be interpreted literally it could easily lend itself to abuse. The main, if not avowed, purposes of the Act—to prevent the organization of the Communist conspiracy from growing to a point where it could become dangerous, to make known to the people of the United States the nature of the Communist movement so that individuals who joined it would know what they were getting themselves into—could have been achieved by invoking other legislation, particularly the provisions calling for the registration of agents of a foreign government. An overwhelming case could have been made out in court for the indictment

of the Communist party of the United States as an agency of the Soviet regime, and of every member who continued in it as an agent of a foreign power. Although the listing of such agents would carry no legal sanctions, it is not likely that any but a hardened core would be prepared to flaunt publicly the fact of their primary allegiance to a hostile power. The Communist party would, of course, seek to mask itself behind other organizations, but it would do that less easily than today. The Progressive party and the American Labor party in New York, though notorious Communist party fronts, cannot be molested under the Smith Act because they are careful to avoid teaching or advocating revolutionary overthrow. Nor would they—or should they—be molested, as organizations, under the Foreign Agents Registration Act. But if the mechanism by which they were set up were ever publicly exposed, those individuals who moved behind the scenes might very well have to be listed under the Foreign Agents Registration Act.

Nonetheless, the Supreme Court has now so interpreted the Smith Act as really to amend it. Advocating violent overthrow is illegal only when such advocacy constitutes a clear and present danger to the security of our democracy. (The general principle behind that interpretation is unassailable except in the eyes of ritualistic liberals who have forsaken the primary tenet in the faith of a liberal, viz., the use of intelligence to determine which of the conflicting claims behind a conflict of rights is prior.) A way should be found, however, to leave the determination of the fact that a clear and present danger exists to juries or to Congress, instead of making it subject to legal determination by the bench at any level.

HOWEVER doubtful the wisdom of enacting the Smith law, the wisdom of now repealing it is even more doubtful. Such repeal would give new life to an illusion whose widespread and pernicious character was partly responsible for the original enactment

of the Act: namely, that the Communist party is a political party like any other on the American scene and therefore entitled to the same rights and privileges as all other American political parties. The currency of this attitude among certain circles, especially in the colleges and universities, is amazing. Here is a man who applies for a commission in the army, a research post in a key plant, an important professorship in which he has an opportunity to influence thousands. If he has the technical qualifications, he is entitled to the position no matter whether he is a member of the Republican, Democratic, or Socialist party. Given knowledge of what these parties are, there can be no doubt about this—nor is there. But, then, nine times out of ten one hears—or used to hear—"and since the Communist party is a legal party, just like any other, a member of the Communist party is also entitled to the post for which he has technical qualifications, just like anyone else."

That the Communist party, although legal, was an organized conspiratorial movement to destroy the structure of freedom in every aspect of political and cultural life was either not known or ignored. As a result of the court trials held under the Smith Act, the facts about the Communist party, proven in the sharp debate and prolonged inquiry of the legal process, are now easily accessible. To repeal the Smith Act, instead of continuing the process of reasonable amendment, would probably lead many to conclude either that the Communist party had changed its character, or that it did not really advocate the overthrow of democratic institutions by force and violence. Both conclusions would be false.

To reasonable and responsible men, the conclusion will appear plausible that, as long as the cold war rages between the Soviet Union and the democratic West, the Smith Act, now the law of the land, can by amendment and intelligent enforcement serve a therapeutic function without endangering the tradition of American rights and liberties.